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No. 160

In the Supreme Court of the United States

OCTOBER TERM, 1960

THOMAS HENRY HUNSAKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 14-22; R. 37-42) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1960 (Pet. App. 22-23; R. 43). The petition for a writ of certiorari was filed on June 20, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Gold Reserve Act of 1934 and the regulations promulgated thereunder, providing a li-

censing system for the conditions under which gold may be held and exported, are constitutional.

2. Whether the indictment sufficiently charged a conspiracy to defraud the United States in the exercise of a governmental function.

3. Whether the indictment supports the sentence of eighteen months.

4. Whether the charge to the jury erroneously implied that the court had already decided that petitioner was guilty.

STATUTES AND REGULATIONS INVOLVED

31 U.S.C. 440-443 provide as follows:

§ 440. Short title.

The short title of sections 315b, 405b, 408a, 408b, 440-446, 733, 734, 752, 753, 754a, 754b, 767, 771, 821, 822a, 822b, and 824 of this title and sections 213, 411-415, 417, and 467 of Title 12 shall be the "Gold Reserve Act of 1934."

§ 441. Title to gold coin and bullion transferred to United States; payment therefor.

On January 30, 1934, all right, title, and interest, and every claim of the Board of Governors of the Federal Reserve System, of every Federal Reserve bank, and of every Federal Reserve agent, in and to any and all gold coin and gold bullion shall pass to and are vested in the United States; and in payment therefor credits in equivalent amounts in dollars are hereby established in the Treasury in the accounts authorized under section 467 of Title 12. Balances in such accounts shall be payable in gold certificates, which shall be in such form and in such denominations as the Secretary of the Treasury may determine. All gold

so transferred, not in the possession of the United States, shall be held in custody for the United States and delivered upon the order of the Secretary of the Treasury; and the Board of Governors of the Federal Reserve System, the Federal Reserve banks, and the Federal Reserve agents shall give such instructions and shall take such action as may be necessary to assure that such gold shall be so held and delivered.

§ 442. Regulations for the acquisition and use of gold; exemption of gold held beyond continental United States.

The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and (c) for such other purposes as in his judgment are not inconsistent with the purposes of sections 315b, 405b, 408a, 408b, 440-446, 733, 734, 752, 753, 754a, 754b, 767, 771, 821, 822a, 822b, and 824 of this title and sections 213, 411-415, 417, and 467 of Title 12. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. Such regulations may exempt from the provisions of this section, in whole or in part, gold situated in places beyond the limits of the continental United States.

§ 443. Acquisition and use of gold in violation of law; penalties.

Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in custody, in violation of sections 315b, 405b, 408a, 408b, 440-446, 733, 734, 752, 753, 754a, 754b, 767, 771, 821, 822a, 822b, and 824 of this title and sections 213, 411-415, 417, and 467 of Title 12 or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of said sections or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred.

18 U.S.C. 371 provides:

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not

exceed the maximum punishment provided for such misdemeanor.

31 C.F.R. 54.12 provides:

Conditions under which gold may be acquired, held, melted, etc. Gold in any form may be acquired, held, transported, melted or treated, imported, exported, or earmarked only to the extent permitted by and subject to the conditions prescribed in the regulations in this part or licenses issued thereunder.

31 C.F.R. 54.22 provides:

Licenses required. Except as permitted in §§ 54.12 to 54.20, inclusive, and § 54.21, gold may be acquired and held, transported, melted or treated, imported, exported or earmarked for industrial, professional or artistic use only to the extent permitted by licenses issued under § 54.25.

STATEMENT

Petitioner and one Adkisson, since deceased, were charged in a one-count indictment returned in the United States District Court for the District of Oregon with conspiracy (1) to commit offenses against the United States in violation of 31 U.S.C. 440 through 443 and the regulations promulgated thereunder; and (2) to defraud the United States in the exercise of its governmental functions relating to monetary policies. The indictment charged "that defendants, without a license duly issued, would acquire, hold, transport and offer to sell and dispose of, at any one time, fine gold in quantities in excess of that permitted by" the regulations and, instead of using it for purposes permitted by the statutes and regulations, would offer and undertake to sell and dispose of it without holding the required license (R. 3-4). The three overt acts alleged

were that on May 2, 1958, the defendants transported, had in their joint possession, and submitted to others for inspection a quantity of fine gold in excess of that permitted by the regulations (R. 4-5).

The jury found petitioner guilty as charged (R. 8) and the court sentenced him to imprisonment for eighteen months (R. 8-9). On appeal (R. 10), the conviction was affirmed (R. 37-43).

ARGUMENT

1. There is no substance to petitioner's contention (Pet. 4-7) that the relevant provisions in 31 U.S.C. 440-443 of the Gold Reserve Act of 1934 and the gold regulations promulgated thereunder are unconstitutional. The Gold Reserve Act, enacted to control the value of gold in stabilizing the national monetary system, is supported by the broad constitutional authority of the federal government with relation to the monetary system. As this Court said in the leading Gold Clause cases, *Norman* v. *Baltimore & Ohio*

See also the carefully considered opinions in *Lagocz v. Kenny*, 270 F. 2d 580, 580-582 (C.A. 2), certiorari denied, 361 U.S. 933, and *Uebersee Finanz-Korporation v. Rosen*, 83 F. 2d 225, 229-230 (C.A. 2), certiorari denied, 298 U.S. 679.

Nor do the regulations involve an unconstitutional delegation of legislative powers to the Secretary of the Treasury. Congress, not the Treasury, proscribed the acquisition and use of gold subject only to the power of the Treasury to grant exceptions by regulation. In permitting the Secretary to grant exceptions for the purposes set forth in (a), (b), and (c) of 31 U.S.C. 442 (*supra*, p. 3), Congress established sufficient standards and effected a lawful delegation of power. *Uebersee Finanz-Korporation v. Rosen*, *supra*, 83 F. 2d at 230; *Lagocz v. Kenny*, *supra*, 270 F. 2d at 582.

2. The indictment charged conjunctively conspiracy (1) to commit offenses against the United States in violation of 31 U.S.C. 440-443 and the gold regulations; and (2) to defraud the United States in the exercise of its governmental functions relating to monetary policies by holding and offering to dispose of gold without a license in quantities in excess of those permitted by the regulations (R. 3-4). Petitioner attacks (Pet. 8) that part of the indictment which charged conspiracy to defraud the United States in the exercise of its governmental function, arguing that under *Hammerschmidt v. United States*, 265 U.S. 182, 188, the omission of an allegation that obstruction of the governmental function was by "deceit, craft or trickery, or at least by means that are dishonest," was fatal. But *Hammerschmidt* held only that the word "defraud" as used in the conspiracy statute requires proof of dishonest means, and hence that an indictment

which charged, not dishonesty but open defiance, was insufficient to state an offense. It does not follow, however, that an indictment which charges a scheme to defraud must spell out in detail the dishonesty or trickery involved, since the Court stated that "to defraud" itself refers to "trick, deceit, chicane or overreaching." *Id.* at 188. Here the allegations of the indictment, that there was a conspiracy *to defraud* the United States by obtaining and disposing of gold without the required license, adequately charged a scheme to acquire and dispose of gold by dishonest means. And, unlike *Hammerschmidt*, the specific allegations were fully consistent with the general charge of fraud—that is, trickery and dishonesty—required by the statute.[1]

In any event—even if contrary to our contentions the indictment was loosely or poorly drawn—petitioner was adequately informed of the charge against him. Since no prejudice has been shown, the indictment is not vulnerable to attack after verdict on an issue of pleading raised for the first time on appeal. *Hagner v. United States*, 285 U.S. 427, 433.

3. Petitioner argues (Pet. 9-10) that, since violations of the Gold Reserve Act of 1934 are made punishable by civil penalties[2] and not criminally, he could be punished only under the second paragraph of the conspiracy statute, 18 U.S.C., 371 *supra*, p. 11, as for a conspiracy to commit a misdemeanor, and that the eighteen-month sentence is therefore excessive. But both conspiracies charged in the indictment—to commit offenses against the United States in violation of 31

[1] At the trial, the court's charge defined a conspiracy to defraud the United States as meaning "* * * to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest" (R. 24).

[2] See 31 U.S.C. 443 *supra*, p. 10 (providing for the forfeiture of illegally held gold and a penalty for twice its value to be sued for by the United States, but making no provision for imprisonment).

U.S.C. 440-443 and to defraud the United States—come within paragraph one of 18 U.S.C. 371 and are therefore specifically punishable by imprisonment for up to five years. Paragraph one of 18 U.S.C. 371 includes conspiracies "to commit *any* offense against the United States" with the exception of conspiracy to commit a misdemeanor, which is covered by the second paragraph (emphasis added). Violation of the Gold Reserve Act (31 U.S.C. 440-443) is an offense punishable only by civil penalties and is not a misdemeanor. Thus, the clear language of 18 U.S.C. 371 establishes that such a violation does not come within the exception but rather within the general rule stated in paragraph one. While as Judge Magruder stated for the court below it is perhaps an "incongruity" to impose a greater penalty for conspiracy to commit an offense punishable only by civil penalties than for conspiracy to commit a misdemeanor, this "is a matter for Congress to consider" (Pet. 17). See the detailed discussion of this issue below (Pet. 15-17) and in *United States* v. *Wiesner*, 216 F. 2d 739, 741-742 (C.A. 2) (also dealing with conspiracy to violate the gold regulations). Similarly, since, as shown above, the indictment sufficiently charged a conspiracy "to defraud the United States," the first paragraph of 18 U.S.C. 371 is explicitly applicable.

4. Petitioner contends (Pet. 11-12) that the court erred in its instructions by leaving the jury with the impression that the court had already made up its mind that petitioner was guilty.

As part of its final charge the court stated that the jury had to pass upon the guilt or innocence of each defendant separately and then continued (R. 16):

> You are not called upon to return a verdict as to the innocence or guilt of any other person or persons, so if the evidence convinces you beyond a

reasonable doubt of the guilt of the defendants, or any of them, you should so find, even if you believe one or more other persons also are guilty. You will recall that there was some testimony that the Biles likewise were the ones who melted down this gold in the presence of one of the defendants here. Now you may find that these people might be guilty also, but they are not before us, and there is nothing that you can do to find them guilty. Your sole inquiry should be: Did the evidence in this case prove beyond a reasonable doubt that one or both of these defendants, that is, Hansaker or Adkisson,—are guilty? Then if it did prove that, then you would find them guilty. If the evidence fails to prove that they are guilty beyond a reasonable doubt and a moral certainty, then you should find them not guilty.

When asked for exceptions to the charge in the judge's chambers, petitioner's counsel objected that the statement about the possibility of also finding the Biles guilty, left the jury with the impression that the court was inadvertently assuming that the defendants were guilty. The court remarked that this was a slip of the tongue and that he was going to remedy it (R. 30-31). The court then recalled the jury and gave these further instructions (R. 31-32):

My attention has been called to the fact that I may have made a slip of the tongue. I want to correct it, if I did.

You will recall that I was talking about the fact that the only people on trial are Hansaker and Adkisson. You do not have to worry about anybody else. Now it is said that in discussing that I talked about two people, Biles, and likewise I said you may also find them guilty, the implication being

> that I might have inferred to you that I have come to the conclusion that Hunsaker and Adkisson are guilty by that statement. If anybody got that idea, which I do not believe anybody did, but if they did I did not mean it that way. This is a good time to tell you again what I have told you many times, I am going to tell you what the law is; you tell me what the facts are, and you apply the facts to the law, and even if I should believe that one witness was not telling the truth or one of the defendants or both of them were guilty, you would be at liberty to disregard anything I said or any looks of mine because under the law you are the sole and exclusive judges of the facts and the credibility of all witnesses. I did not intend to tell you how I would decide this case because in past cases sometimes I tell you afterwards what I would have done, but I do not tell you before, and I did not intend to do it now.

Petitioner's counsel, still dissatisfied with the charge, reserved an exception and stated that the record would speak for itself (R. 32).

There was no error, even in the charge as originally given. It made no assumption as to petitioner's guilt, but, to the contrary, was explicit in requiring that his guilt or innocence be separately determined based on the evidence in the case. The admonition to disregard a possible finding as to guilt of the Biles, and to confine the inquiry to the guilt or innocence of the petitioner and his codefendant, was favorable, not harmful, to the petitioner. It precluded the jury from finding him guilty by mere association with the Biles if they thought that the Biles were guilty. But even if the original charge might have been construed as implying the court's belief in petitioner's guilt, this erroneous im-

plication was cured by the court's supplemental instructions. Cf. *Pennsylvania Co.* v. *Roy*, 102 U.S. 451, 458-459; *Turner* v. *American Security and Trust Co.*, 213 U.S. 257, 267. The supplemental charge unequivocally advised the jury that they should not draw any inference, from the previous remarks as to the Biles, that the court had come to the conclusion that petitioner and his co-defendant were guilty and that they should decide guilt or innocence for themselves. It must be presumed that the jury followed this clear and specific instruction. *Opper* v. *United States*, 348 U.S. 84, 95; *Delli Paoli* v. *United States*, 352 U.S. 232, 242.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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